

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 32226-2-III

STATE OF WASHINGTON, Respondent,

v.

TROY J. WILCOXON, Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER – TROY J. WILCOXON

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I. INTRODUCTION

Troy J. Wilcoxon was tried jointly with James Nollette for the burglary of Lancer Lanes Casino in Clarkston and convicted. During trial, the trial court permitted the State to introduce statements Nollette made to an acquaintance about the role of his “friend” in the burglary. Wilcoxon’s motion to sever the trials was denied and on appeal, the Court of Appeals ruled that introducing the statements did not violate Wilcoxon’s Sixth Amendment confrontation rights under *Bruton v. U.S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), because Nollette’s statements were not testimonial. This Court granted review of the following questions:

1. Whether *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), limits the scope of *Bruton* claims to testimonial statements alone;
2. Whether the statements at issue in this case were not testimonial;
and
3. Whether the trial court had an obligation to give a limiting instruction *sua sponte* to ensure the statements were not used as substantive evidence against Wilcoxon.

II. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that admission of Nollette's out-of-court statements did not violate Wilcoxon's confrontation rights when Nollette was a co-defendant and could not be compelled to testify about the statements.
2. The Court of Appeals erred in holding that *Bruton v. U.S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) requires severance of trials or exclusion of inculpatory co-defendant hearsay statements only when the statements are testimonial.
3. The Court of Appeals erred in holding that the trial court was not required to give a limiting instruction *sua sponte* that the jury could not consider Nollette's out-of-court statement implicating Wilcoxon as substantive evidence of Wilcoxon's guilt.
4. The Court of Appeals erred in holding that any error in admitting Nollette's extrajudicial statement was harmless.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the U.S. Supreme Court's decision in *Crawford* limit the scope of its holding in *Bruton*?
2. Why is cross-examination of critical importance in dealing with co-defendant statements implicating another as a class?

3. Are the concerns that gave rise to *Crawford* the same concerns that gave rise to *Bruton*?
4. Does the Court of Appeals' ruling effectively abrogate earlier decisions applying *Bruton* analysis to non-testimonial statements?
5. Does the admission of redacted co-defendant statements require instructions to the jury as a matter of constitutional import?
6. Is there precedent in Washington for requiring jury instructions to protect a defendant's constitutional rights?
7. When the trial court allowed the jury to consider the "powerfully incriminating" statements Nollette made to Solem about his friend's involvement in the burglary without limiting the jury's consideration of that evidence, is the error harmless?

IV. STATEMENT OF THE CASE

Wilcoxon's statement of the case is set forth in full in the Petition for Review filed herein.

V. ARGUMENT

A. The Court of Appeals' summary reliance on *Crawford* to evaluate co-defendant statements overlooks the unique structural challenges they pose to the trial process and the verdict.

In its published opinion, the Court of Appeals contended that in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the U.S. Supreme Court “revolutionized” Confrontation Clause jurisprudence such that the right of confrontation extends only to testimonial statements. *Slip op.* no. 32226-2-III, at 7. But the *Crawford* Court itself disclaimed the Court of Appeals' conclusion that the full scope of the Sixth Amendment confrontation right is limited to testimonial hearsay, stating, “[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object.” 541 U.S. at 53. Moreover, the *Crawford* Court expressly declined to construe the Confrontation Clause as limited solely to testimonial statements, leaving non-testimonial statements to be governed under ordinary hearsay rules. 541 U.S. at 61 (*discussing White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L.Ed.2d 848 (1992)). The Court of Appeals' holding, therefore, expanded the *Crawford* rule into an absolute limitation of the Sixth Amendment to testimonial statements despite the *Crawford* Court's own express refusal to impose such a limit.

Contrary to the Court of Appeals' rationale, the Confrontation Clause jurisprudence supports a conclusion that inculpatory extra-judicial statements by co-defendants, whether testimonial or not, pose unique threats to the truth-finding function of the trial. As such, *Bruton v. U.S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and its progeny, remain binding authority in evaluating the scope of the Sixth Amendment's application to co-defendant hearsay.

Courts have long recognized that statements by co-defendants implicating other criminal participants are particularly untrustworthy in light of the "recognized motivation to shift blame onto others." *Bruton*, 391 U.S. at 136. Co-defendant confessions are inherently unreliable due to the risk that the co-defendant may be attempting to shift or spread blame, curry favor, obtain vengeance, or divert attention toward another suspect. *Lee v. Illinois*, 476 U.S. 530, 545, 106 S. Ct. 2056, 90 L.Ed.2d 514 (1986). Such statements are, therefore, less credible than ordinary hearsay evidence. *State v. Whelchel*, 115 Wn.2d 708, 717, 801 P.2d 948 (1990) (*quoting Lee*, 476 U.S. at 541). For this reason, extra-judicial co-defendant statements have been considered by the high court as a separate class of evidence, whose particular prejudice requires particular treatment. *See Gray v. Maryland*, 523 U.S. 185, 192, 118 S. Ct. 1151, 140 L.Ed.2d 294 (1998).

Because of the inherent unreliability of co-defendant statements naming another as the guilty party, cross-examination serves a fundamental role in promoting the reliability of a criminal trial. *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L.Ed.2d 631 (1987). “The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process.” *Id.* at 736; *see also Lilly v. Virginia*, 527 U.S. 116, 123-24, 119 S. Ct. 1887, 144 L.Ed.2d 117 (1999) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”). Cross-examination provides an opportunity for the jury to look upon the declarant and evaluate the credibility of the declarant’s statement by considering his demeanor on the stand and his manner of testifying. *California v. Green*, 399 U.S. 149, 157, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970) (*quoting Mattox v. U.S.*, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L.Ed.409 (1895)). “[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.” *Pointer v. Texas*, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965).

Confrontation through cross-examination at trial thus serves to ameliorate inherent dangers in admitting out-of-court statements because it:

(1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the “greatest legal engine ever invented for the discovery of truth”; (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Green, 399 U.S. at 158. Effectively, cross-examination requires the declarant to either affirm, deny, or qualify the prior statement under penalty of perjury, in the presence of the jury. *Id.* at 158-59. This preserves the jury’s role as ultimate finder of fact by permitting it to engage in a first-hand evaluation of the testimony rather than relying on a dry transcript void of nuance and context, or the filtered, second-hand account of the witness to whom the out-of-court statement was made.

Because confronting a witness in the presence of the jury is a critical feature of the trial’s truth-finding function, the Sixth Amendment confrontation right is closely related to the Fourteenth Amendment’s due process requirement. *See Pointer*, 380 U.S. at 405. Permitting such presumptively unreliable evidence as a co-defendant statement to be

presented to the jury without testing through confrontation and without providing the jury the opportunity to evaluate the confessor's veracity first-hand serves to undermine the truth-finding function of the trial. As such, the right to confront a confessing co-defendant adopted in *Bruton* addresses a different set of concerns than the "trial by affidavit" process that was the core concern of *Crawford*. Because the inherent unreliability of co-defendant statements exists regardless of the identity of the witness to whom they are made, applying the *Crawford* reasoning to *Bruton* evidence contradicts the fundamental reasoning of the *Bruton* jurisprudence – a trial in which the defendant cannot confront a confessing co-defendant cannot be relied upon to produce a just result. *See Lee*, 476 U.S. at 542 ("Our ruling in *Bruton* illustrates the extent of the Court's concern that admission of this type of evidence will distort the truthfinding process.").

Notably, the U.S. Supreme Court has not itself reconsidered its *Bruton* jurisprudence in light of *Crawford*, or approved the limitation of *Bruton* adopted by the Court of Appeals here. Further, although the *Crawford* Court sought to demonstrate that the Court's prior Sixth Amendment jurisprudence was consistent with the distinction that testimonial hearsay requires cross-examination while non-testimonial

statements do not, no such distinction has been historically maintained in the context of co-defendant statements.

In *Richardson v. Marsh*, 481 U.S. 200, 203-04, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987), the Court considered whether the Sixth Amendment permitted introduction of a co-defendant confession describing a conversation that occurred in the car on the way to the scene of the crime. The conversation was redacted to eliminate any reference to Marsh, and the jury was instructed not to use the statement against Marsh. *Id.* at 204. At trial, however, Marsh testified and placed herself in the car where the conversation occurred, claiming she could not hear the conversation. *Id.* The *Richardson* Court held that introduction of the conversation did not offend the Sixth Amendment not because it was non-testimonial, but because it had been redacted to eliminate any reference to Marsh's existence and was accompanied with a limiting instruction prohibiting the jury from using the conversation against Marsh. *Id.* at 205, 211.

Likewise, Washington Courts have not always applied a distinction between testimonial and non-testimonial statements in analyzing co-defendant confessions. In *State v. Cotten*, 75 Wn. App. 669, 879 P.2d 971 (1994), the Court of Appeals evaluated the admissibility of out-of-court statements made by one co-defendant to third-party witnesses that did not

directly implicate the defendant. The *Cotten* Court decided the issue not on the grounds that the Sixth Amendment was not implicated because the statements at issue were non-testimonial – which they were, under the Court of Appeals’ reasoning here – but on the grounds that the Sixth Amendment was not offended because the defendant was not named or implicated, consistent with *Richardson*. *Id.* at 691-92. More damning, however, is *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), in which this Court held that introduction of certain statements made between co-conspirators, while compliant with the hearsay rules, nevertheless denied the defendants their confrontation right when the declarant was arrested and invoked his privilege against self-incrimination. Under the *Crawford* analysis, the co-conspirator statements were not testimonial. Under the Court of Appeals’ reasoning here, the confrontation right does not arise and *Guloy* was decided incorrectly.

Other courts have acknowledged that *Bruton* and *Crawford* address different concerns arising under the Sixth Amendment. In evaluating the interplay between *Bruton* jurisprudence and *Crawford* jurisprudence, the Pennsylvania Superior Court stated:

Both *Crawford* and *Bruton* define the contours of the Confrontation Clause of the Sixth Amendment, but they do so for different purposes. *Crawford* ensures the procedural guarantee of the Confrontation Clause by requiring that the

reliability of testimonial hearsay presented *against the defendant* be assessed in a particular manner, i.e., by testing in the crucible of cross-examination. *Crawford*, 541 U.S. at 61, 124 S.Ct. 1354. *Bruton*, and its progeny, *Travers*, on the other hand, act to neutralize the incriminating *effect* on the defendant of properly admitted confessions from a non-testifying co-defendant presented *against the co-defendant* at a joint trial. See *Travers*, at 373, 768 A.2d at 851. This distinction is crucial, and it arises from the core concern of *Bruton*, i.e., a confession from a non-testifying co-defendant that directly incriminates the defendant in a joint trial is of such a powerfully incriminating nature that a jury instruction limiting the jury's consideration of the confession to the co-defendant would be insufficient to cure the prejudice to the defendant from the confession's admission at trial. *Bruton*, 391 U.S. at 135-36, 88 S.Ct. 1620. Thus, *Bruton* and its progeny provide a narrow exception to the general presumption that juries follow the instructions placed on them by the trial court.

Com. v. Whitaker, 878 A.2d 914, 922 (P.A. Super. 2005).

The distinction recognized in *Whitaker* is critical: *Crawford* concerns evidence that is proffered against the defendant, whereas *Bruton* concerns evidence that is admissible only against the co-defendant. The *Bruton* rule arises because, while a co-defendant's out-of-court statements against his own penal interests may be admissible against that co-defendant, there is no hearsay exception for out-of-court statements against another's penal interests. ER 804(b)(3). As such, those portions of a co-defendant's statement that implicate the defendant are not admissible against the defendant. See *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000). In fact, unlike the self-inculpatory portions of such a

statement, the self-serving portions are presumed to be unreliable. *Id.* at 496. But the *Bruton* Court acknowledged that co-defendant statements implicating a co-defendant nevertheless have such a powerful effect on a jury that a limiting instruction, given to limit the jury's use of the statements only as to the co-defendant's guilt, cannot realistically be followed. 391 U.S. at 135-36.

Applying this distinction, the core of the *Crawford* jurisprudence is the opportunity to test the reliability of evidence introduced against a defendant. By contrast, the core of the *Bruton* jurisprudence is the risk that the jury will disregard its instructions and rely upon highly unreliable, untested evidence offered against the co-defendant to find the defendant guilty. That structural risk is ameliorated only when the limiting instruction is combined with redaction of the statement to eliminate the self-serving portions under *Richardson*, or when the co-defendant waives his Fifth Amendment privilege and testifies subject to cross-examination. In holding that *Crawford* limits *Bruton*'s application to testimonial statements alone, the Court of Appeals disregarded the reasoning of *Bruton* and the powerfully prejudicial effect co-defendant statements have on the jury's decision-making.

In light of the harms to which *Bruton* is addressed, applying the *Crawford* distinction so as to admit non-testimonial (yet still unreliable and unchallenged) co-defendant confessions while excluding testimonial co-defendant confessions creates an absurd result. There is no logical or practical basis for the distinction in the *Bruton* context – the Court of Appeals’ ruling simply serves to carve out an exception that allows convictions to rest upon unreliable evidence and jury prejudice.

B. When co-defendant statements are introduced, a limiting instruction is constitutionally required under *Richardson*.

The Court of Appeals cited to multiple cases involving failure to request limiting instructions as to ER 404(b) evidence in support of its summary conclusion that “failure to give a limiting instruction is not constitutional error” in the context of co-defendant statements. *Slip. op.* no. 32226-2-III, at 10. This conclusion demonstrates the Court of Appeals’ failure to recognize the constitutional concerns at the core of *Bruton*.

Contrary to the Court of Appeals’ contention, jury instructions have been required in Washington to protect a defendant’s constitutional rights. The most evident example is the instruction required by *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *overruled on other grounds*

in *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988), which requires that the jury be advised it must agree unanimously upon the same underlying conduct in “multiple acts” cases in order to protect the defendant’s constitutional right to a unanimous jury verdict. *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990). While *Petrich* cases have not expressly used the “sua sponte” language in describing the requirement, because failure to give the instruction violates a defendant’s constitutional right, it is reversible error unless harmless beyond a reasonable doubt. *Id.*

As with the *Petrich* instruction, failure to give a limiting instruction when admitting a co-defendant statement is of constitutional magnitude because it undermines the defendant’s rights to cross-examination and to an impartial jury. “[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors . . . A fair trial in a fair tribunal is a basic requirement of due process.” *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961). The *Bruton* Court acknowledged that a co-defendant statement implicating the defendant is so incriminating that it “cannot be wiped from the brains of jurors. The admonition therefore becomes a futile collocation of words . . .” 391 U.S. at 129 (*adopting reasoning of dissent in Delli Paoli v. U.S.*, 352 U.S. 232, 77 S. Ct. 294, 1 L.Ed.2d 278 (1957)).

Under *Bruton*, the rationale for including such statements under hearsay grounds “also requires its exclusion as a constitutional matter.” *Id.* at 136, n. 12. Thus, the *Bruton* Court considered introduction of untested co-defendant statements as a constitutional matter because (1) such statements are highly suspect, and thus pose the kind of threat to a fair trial at which the Confrontation Clause was directed; and (2) such statements have such an impact on the jury that it cannot, realistically, be expected to disregard them even if so instructed.

These concerns that the jury’s impartiality will be tainted and a conviction will be based upon unreliable, unchallenged evidence are mitigated when the statement is redacted *and* the jury is properly instructed in the use of the statement. *Richardson*, 481 U.S. at 211; *see also Zafiro v. U.S.*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L.Ed.2d 317 (1993) (limiting instructions may cure prejudice that would otherwise result from a joint trial). These precautions serve both to ameliorate the risk that unreliable evidence will taint the trial when it is not subject to cross-examination by eliminating the self-serving portions of it, and to ensure the jury does not use the evidence to draw inappropriate inferences against the defendant. Applying the *Richardson* rule preserves jury impartiality by eliminating the prejudice associated with introducing unreliable evidence implicating the defendant that cannot be tested. This

benefit is lost, and the inherent dangers that demand cross-examination re-emerge, when the jury's use of the statement is not expressly limited by instruction.

Because *Bruton* and *Richardson*'s constitutional concerns involve the impact upon the jury of untested extra-judicial statements, compliance with their mandates is of constitutional magnitude. As in the case of the unanimity instruction required under *Petrich*, the instruction required under *Richardson* is necessary to ensure the jury verdict is sound and protective of the defendant's constitutional guarantees. For the trial court not to give the instruction in this case, particularly where the prosecuting attorney relied so heavily on Nollette's statements to argue Wilcoxon's guilt, simply revives all of the constitutional concerns that unreliable evidence will taint jury verdicts that the *Bruton* Court sought to put to rest.

C. The Court of Appeals erred in concluding the error was harmless beyond a reasonable doubt because it failed to account for the inherent prejudice recognized in *Bruton*.

The Court of Appeals correctly observed that the error in admitting Nollette's statement and its use against Wilcoxon, if of constitutional magnitude, is subject to harmless error analysis. *Slip op.* no. 32226-2-III, at 10. Under the harmless standard, the court is to consider the entire

record to determine whether the error did not contribute to the verdict beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993); *Rose v. Clark*, 478 U.S. 570, 583, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986).

In evaluating the prejudice to Wilcoxon, the Court of Appeals necessarily disregarded the inherent prejudice and “devastating” impact of co-defendant statements as a class. *Cruz v. New York*, 481 U.S. 186, 191, 107 S. Ct. 1714, 95 L.Ed.2d 162 (1987). Indeed, the entire rationale behind the *Bruton* rule is that the statements, while inherently suspect, are nevertheless so prejudicial that the jury cannot reasonably be expected to disregard them as to the defendant. 391 U.S. at 135-36. Indeed, if Nollette’s statements about his friend’s involvement in the burglary were as minimally incriminating as the Court of Appeals describes, one must wonder why the prosecuting attorney thought it would be helpful to refer to the statements about the “friend” to implicate Wilcoxon four separate times in its closing argument.

Contrary to the Court of Appeals’ ruling, *Bruton*’s bright-line rule presumes that the jury improperly relies upon co-defendant statements implicating another. Nothing in the present case undermines that presumption, and the lack of appropriate limiting instruction further

aggravates it. The untainted evidence in this case is not so overwhelming that it necessarily leads to a conclusion of guilt – absent Nollette’s confession to Solem, the primary evidence of Wilcoxon’s guilt was the testimony of Bomar, who was himself investigated in connection with the burglary and gave inconsistent statements to investigators. Accordingly, it is highly unlikely that the jury disregarded the prejudicial inferences recognized in *Bruton* and argued by the prosecuting attorney to resolve the conflicting factual issues.

VI. CONCLUSION

For the foregoing reasons, this Court should REVERSE Wilcoxon’s conviction on the grounds that introducing the co-defendant Nollette’s extra-judicial statements implicating Wilcoxon without redaction or limiting instruction in a joint trial violated Wilcoxon’s Sixth Amendment confrontation rights under *Bruton*.

RESPECTFULLY SUBMITTED this 3rd day of August, 2015.

BURKHART & BURKHART, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhardt", is written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner